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## Constitutionalism and New Governance in the European Union: Rethinking the Boundaries

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### **Abstract:**

This paper examines the relationship between constitutionalism and New Methods of Governance (NMG) in the EU. It argues that in many respects the relationship is one which tends to challenge, marginalise or misrepresent NMG. In particular, those state-derivative aspects of constitutionalism in the EU which emphasize the themes of hierarchy and self-containment threaten respectively to consign NMG to a position of minor significance and to ignore the potential of NMG as a bridge between European and national systems. Alternatively, a more reflexive approach to constitutionalism which retains the state-derivative idea of constitutionalism as a realization, and indeed as a form of mobilization, of political community, but discards some of this command and control orthodoxies as inappropriate to a more institutionally dispersed and socially responsive polity promises to capture the normative potential of NMG more effectively.

### **Keywords:**

**Constitutional change/ governance /polity building/ .supranationalism/ political representation/ law**



# **Constitutionalism and New Governance in the European Union: Rethinking the Boundaries\***

*Neil Walker*

## **1. Introduction**

There are many and contested ways of defining both constitutionalism and new governance in the context of the European Union, and even more and more variously contested ways of defining the relationship between these two notions. Part of my purpose in this essay will be to map what I see as five key candidate relationships between constitutionalism and New Governance - or, if you like, the key dimensions of *the* relationship between constitutionalism and new governance, and to explain why each of them tells us something of importance about the peculiar regulatory dynamic of the European Union. The sketch, then, is a cumulative one rather than a series of alternative visions, for even if some of the possible relationships set out are in mutual tension, each addresses a connection (or a disconnection) which speaks plausibly to one aspect of the EU's situation. My purpose, however, is not merely cartographical. I also want to suggest that the first four possible relationships discussed - namely subsumption, instrumentalization, non-correspondence and structural antagonism - are all finally limiting relationships. Each plays on a different dimension of the weakness or myopia of the constitutional paradigm in the European Union, and its failure to grasp new governance fully, as well as upon a certain overemphasis on "definition-by-contrast"<sup>1</sup> and a consequent fuzziness over the content and significance of the 'new' within the notion of New Governance itself. The fifth possible relationship, which flows from the insight that constitutionalism's historic connection to the idea of responsible self-government requires to be rethought for the postnational domain, holds out the possibility that constitutionalism need not be viewed in these limiting terms and, accordingly, that New Governance's horizons of innovation need neither be limited by these limiting terms nor depend on the wholesale rejection of constitutional discourse. It inquires instead into the more profound transformative possibilities for both constitutionalism and New Governance of a deeper level of mutual engagement.

## **2. Constitutionalism and New Governance: Moveable Objects in a Limiting Frame**

First, though, as a prelude to examining the various candidate relationship between constitutionalism and New Governance, we must address a more basic puzzle. If, as already suggested, both constitutionalism and New Governance are objects whose definition is vague and highly diverse, in what sense can the normal range of conceptions of the relationship between them nevertheless be seen as limiting? To answer this question requires some investigation of the way in which the discourses both of constitutionalism and of New Governance have developed in the EU context.

*(i) European Constitutionalism*

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\* Forthcoming in G. De Burca and J. Scott (eds), *New Governance, Law and Constitutionalism* (Oxford: Hart)

<sup>1</sup> G. De Burca and J. Scott, "New Governance, Law and Constitutionalism" (present volume).

Let us first consider constitutionalism. Four themes in the historical development of European constitutionalism are worth emphasizing for present purposes. These are in turn nominalism, textualism, hierarchy and self-containment.

By *nominalism* we mean, simply, the tendency for constitutionalism to become anything or everything anyone claims it to be. Even at the state level, constitutionalism is a highly open-ended discourse, and this is due to a combination of its ideological potency and its wide range of options and inherent contentiousness as a form of social technology or praxis. Its ideological potency consists in the added symbolic value to be derived from claiming for one's political preferences the weight of constitutional authority.<sup>2</sup> In turn, the special gravitas of constitutional authority rests upon its capacity to speak, often simultaneously, to one or both of two powerfully affirmative if apparently divergent legitimating traditions in the making and sustaining of modern political community.<sup>3</sup> Constitutionalism invokes, first, a tradition of universalism, or at least of universalizability – the idea that constitutional claims are good claims because since the birth of modern constitutionalism and the preambles of the first Constitutional Charters in 19<sup>th</sup> century America and France they have often purported to speak to norms or principle of good government and social organization which hold or should hold everywhere and for everyone, with any specific claim also an instantiation of the universal. Yet constitutionalism invokes, secondly, just as weighty a tradition of particularism, here responding to an equally powerful emphasis in the origins of modern statehood on the specificity of each *societas*<sup>4</sup> and its sovereign, and on the peculiarity and special moral status of the claims that members of the same polity can make *inter se*. Here the strength of the constitutional claim lies in its being exclusively or especially well suited to, and indeed often already firmly embedded within and corroborated by the law or mores of a particular polity.

Constitutionalism's inherent contentiousness as a form of social technology concerns the understandable degree of divergence about what counts as and what may be manipulated as 'constitutive' within a polity, regardless of whether we take a universalistic or particularistic view of that polity. At the basic social-technological level constitutionalism produces a three-level puzzle – normative, epistemic and motivational.<sup>5</sup> Normatively, this has to do with the basic aims of the constitution, the version or versions of the good society it wants to effect or endorse. Epistemically, it has to do with an understanding of the key generative mechanisms – or self-understanding – of the political society in question. Motivationally, it has to do with the capacity of the constitution to encourage human agents to activate these generative mechanisms and to provide them with institutions which enable them to do so in a way that is consistent with the constitution's normative aspirations. If we see a constitution as a "model"<sup>6</sup> of political community, this interweaving of the normative, the epistemic and the motivational becomes clearer. A constitution is a model in the double sense of referring back to and representing in miniature what is the supposed basis of affinity of that community, whether ethnicity, common culture, common values or shared predicament (epistemic question), and projecting forwards by supplying the means towards

<sup>2</sup> See e.g. N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 MLR 317-359, at 331-3.

<sup>3</sup> P. Kahn *The Reign of Law*, (New Haven, Yale University Press, 1997)

<sup>4</sup> R. Jackson, "Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape" (1999) 67 *Political Studies* 431-456, 441-444.

<sup>5</sup> For a study of the interaction of the epistemic and motivational dimensions in EU constitutionalism, with particular reference to the debate over the Constitutional Treaty, see N. Walker "Europe's Constitutional momentum and the Idea of Polity Legitimacy" (2005) 3 I\*CON 211-238.

<sup>6</sup> N. Walker "The EU as a Constitutional Project" Federal Trust Online Papers 19/04.

(motivational question) the realization of the substantive aspirations of the polity as conceived in ideal terms (normative question). With such a range of controversial questions in play, even in the most well-established state constitutional order the scope for genuine contention, and for ideological struggle over the symbolically precious resource of constitutionalism as to what lies at its constitutive core, becomes apparent.

In the context of a post-state polity such as the EU, the mix of high ideological stakes and contentiousness at the level of social technology invites an even more rampant nominalism. As the debate over the EU's first documentary Constitution<sup>7</sup> has underlined, the very idea that the EU is the type of entity that ought to be conceived in constitutional terms is itself a matter of ideological controversy. It is bound up, on the one hand, with the traditional link between constitutionalism and statehood, and with the sceptical fear that the adoption of a Constitution might imply or prefigure a partial, incipient or aspiring statehood for the EU, and on the other hand, with the efforts of the more integration-minded to bootstrap the authority of a relatively new, original and politically vulnerable polity.<sup>8</sup> As the failure of the French and Dutch ratification referendums in the early summer of 2005 and the subsequent decision by the June European Council to put the Constitution into deep-freeze<sup>9</sup> indicates, that threshold controversy over whether European constitutionalism dare speak its name is by no means resolved. It is also the case, however, that the sheer momentum of the constitutional debate has encouraged many across the spectrum of enthusiasm for integration - including those most avowedly concerned to combat creeping European statehood and so more interested in constitutionalism's authority-restraining rather than its authority-enabling properties<sup>10</sup> - to endorse a constitutional discourse as the most appropriate and persuasive in which to register their particular conception of the sources, mechanism, purposes and limits of EU governance (and, indeed, to do so regardless even of whether such a conception involves the reduction of the constitution to a canonical written text.).<sup>11</sup> That is to say, notwithstanding the current stand-off over the Constitutional Treaty, the symbolic allure of the constitutional prize has tended to cause the fabric of constitutional argument to stretch rather than tear. And this is reinforced by the sheer novelty of the EU constitutional debate, the openness of the constitutional field to diverse claims encouraged by the lack of any prior self-proclaimed constitutional text for the EU, and the absence of the discipline associated with the obligation to ground claims in the interpretation or critique of any such 'living' text.

To this ideological and practical mix we should add the genuine normative, epistemic and motivational difficulty of modelling a constitution on the basis of any relevant 'constitutional universal' for a non-state polity. Where neither the prior cultural or political supports associated with the state (as the normal instantiation of that 'constitutional universal'), nor, relatedly, the mobilizing power which law may tap by reference to these forms of prior or incipient affinity, nor even the comprehensiveness of political vision associated with the state, are available, or at least not on the same terms or to the same

<sup>7</sup> OJ (C 310) Dec. 16<sup>th</sup> 2004 (hereinafter 'CT').

<sup>8</sup> See e.g. Walker n5 above.

<sup>9</sup> By providing for a period of a year in which Member States might reflect on the progress of ratification, and by extending the ratification deadline from Autumn 2006 to Summer 2007.

<sup>10</sup> As in the famous conversion of the traditionally Eurosceptic *Economist* magazine to the idea of a European Constitution - a conversion entirely contingent upon the endorsement of a power-constraining version of the Charter of Rights See *The Economist*, 4 November 2000.

<sup>11</sup> Of many examples, see the works of Richard Bellamy asserting a broader framework of 'political constitutionalism' against a text-centred constitutional politics; e.g., "The Constitution of Europe: Rights or Democracy?" in R. Bellamy, V. Bufacchi and D. Castiglione (eds) *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Foundation, 1995) 153-175.



degree,<sup>12</sup> then the extent to which European constitutionalism remains uncharted territory becomes clearer, as does the potential for promiscuous constitutional ‘naming and claiming.’ European constitutionalism, in short, has become a protean discourse whose ideological currency is as inflated as its social-technological foundations are unstable, and for that reason is susceptible to highly strategic and opportunistic forms of nominalism.

The second salient feature of contemporary constitutional discourse in the EU is its *textualism*. Here the solipsism of nominalism is replaced - or more often complemented - by the superficiality of text-dependence. In the case of the current Constitutional Treaty, textualism is in fact a product of formalism. Just because we finally may have a text in the appropriate form – one which (in the increasingly unlikely event of its unanimous ratification and implementation) is self-understood and self-authorized *as* a Constitution, or at least as a hybrid *Constitutional* Treaty - the question of what is or is not constitutional becomes resolved in the document itself. Alternatively, and perhaps more pertinently given the likely failure of the Constitutional Treaty, in the claims that the prior and extant treaty structure already constitutes a constitution of sorts, textualism is underpinned by a kind of materialism – an emphasis upon the matter rather than the spirit of the constitution.<sup>13</sup> On this view, the fact that the Treaty texts already contain some of the familiar materials of a written constitution, in particular a detailed organogram of governmental power and of its checks and balances, is enough to validate their constitutional quality and pedigree regardless of whether their underlying motivation and telos is in any sense similar to that commonly found in the case of other written (state) constitutions.

Yet underlying both formalist and materialist variants there is of course a preoccupation with political power. Constitutionalism seen through a textualist lens finally amounts to no more and no less than what succeeds in making it into the documentary Constitution or quasi-Constitution. As with nominalism, so too with textualism, therefore the novelty of the idea of a Constitution beyond or without a state favours an open-ended discourse, even if it is not the mere wish but rather the (putative) textual command that is crucial in the latter case. Moreover, again as with nominalism, the emphasis is on the emergence of the (formally authoritative) word rather than its implementation. A textualist approach begs the question of the impact of the text, and since, as we have seen, the difficulties of developing a relevant social technology for understanding the nature and limits of the generative power of constitutionalism are even more formidable for the post-state than for the state polity, this is a very large question to beg.

If the first two themes of European constitutionalism involve a manifest but rather shallow, and so permissive, borrowing from the state constitutional tradition, the statist legacy of the third and fourth themes is less apparent and often less consciously realized, but ultimately more profound and constraining. *Hierarchy* and *self-containment* are the more venerable and more strongly established and officially endorsed themes of constitutionalism in the EU context. For the jurisprudence of supremacy, direct effect, implied powers etc., developed by the ECJ from the 1960s onwards, and the notion of incipient constitutionalization which grew alongside this<sup>14</sup> is first and foremost concerned with the assertion of the authority and integrity of the new legal order *qua* legal order.

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<sup>12</sup> Walker, n5 above. 216-222.

<sup>13</sup> As in Weiler’s idea of a “constitution without constitutionalism”; see J.H.H.Weiler, *The Constitution of Europe* (Cambridge: CUP, 1999) ch.1

<sup>14</sup> See e.g. P. Craig, “Constitutions, Constitutionalism and the European Union,” (2001) 7 ELJ 125-150. at 128-135.

The operative logic underpinning that process of self-assertion is at root of a traditional Kelsenian variety. It is about the positing of authoritative foundations and differentiating other norms in accordance with the pedigree provided by these foundations. The legal order of the EU unfolds from the self-assuming “judicial *kompetenz-kompetenz*”<sup>15</sup> of the Court in an elaborate chain of validity which encompasses different levels of norms within the Treaty-based European order – as well as the supremacy or priority of EU norms over national norms. The conception of legal hierarchy contained in this model in fact contains two distinct implications. The first is that higher-order norms trump lower-order ones in cases of conflict. The second is that the higher order norms generate the lower-order norms. This formal property of the legal system, moreover, has an important institutional complement, in that the legal-normative hierarchy has also generated and is in practice articulated through and reinforced by an institutional hierarchy, one in which the key law-making institutions (Commission, Parliament and Council) and methods are situated towards the apex of the pyramid, and indeed other institutional features of the legal order – adjudication, administration and monitoring also tend to follow a ‘top-down’ command-and-control logic.

If hierarchy provides the operative logic of the new legal order, then self-containment is its basic premise and self-prophesizing conclusion. The idea that the constitution ‘contains’ its legal order<sup>16</sup> has closely related internal and external dimensions. Internally, it implies that the higher ‘constitutional’ norms of the legal system are the exclusive source of ultimate authority for the legal system. In turn, exclusiveness of source implies exhaustiveness of reach. If the constitutional norms are the only basis of authority for the legal system, then there is no part of the legal order which these norms cannot reach, no ‘lower’ normative arrangements which cannot finally be traced back to the authority of the highest norms. That this idea of comprehensive regulatory control is an important aspect of the constitutional self-understanding of the EU legal order is underscored by the facts of the first two cases in which the ECJ, following its earlier assembly of the building blocks of hierarchy in the direct effect and supremacy line of cases, resorted to a more explicit language in describing the Treaties as the “basic constitutional Charter” of the Community. Tellingly, these dealt, respectively, with the exhaustive reach of the ‘rule of law’ within the European legal order<sup>17</sup> and the exclusive jurisdiction of the ECJ as the Europolity’s court of final authority to determine matters of European law bearing upon the key question of the respective competences of Community institutions and the Member States.<sup>18</sup>

And where from an internal perspective self-containment or integrity implies comprehensive scope and control, from an external perspective it implies that the EU is a separate legal order. Indeed, it is precisely its formal internal ‘completeness’ that vindicates its autonomy from other legal orders. Within the self-containment perspective, in sum, the constitution has a symbiotic relationship with its “own”<sup>19</sup> legal order, supplying it with identity (internally) and distinctiveness (externally).

Looking at these four themes of European constitutionalism in the round, in all cases we can see the drag of the state tradition. In the case of nominalism and textualism, this operates in a loose ideological manner, in the very attempt to invest in the symbolic currency of the rhetorical language or the documentary form of a state-centred tradition.

<sup>15</sup> Weiler n13 above, 298.

<sup>16</sup> See e.g. E. Christodoulidis, *Law and Reflexive Politics*, (Kluwer: Dordrecht, 1998) esp. chs. 6, 8 and 11-14.

<sup>17</sup> Case 294/83, *Parti ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339

<sup>18</sup> Opinion 1/91 *Re Draft Agreement on a European Economic Area* [1991] ECR 6102.

<sup>19</sup> Case 6/64, *Costa v ENEL* ECR 585

In the case of hierarchy and self-containment, the connection is deeper and more implicit. Here constitutionalism is a metaphor for the emergence and consolidation of the very idea of a legal order at the supranational level, one that draws closely on the idea of legal order relevant to statehood and the Westphalian system of states. The combination of epistemic and motivational assumptions involved – that we are dealing with a discrete political order which best regulates itself in accordance with a unitary framework of authority – may be so general and taken-for-granted as often to escape attention, but this is precisely because they are so deeply familiar from the social technology of state constitutionalism.

(ii) *New Governance*

Turning to New Governance, again we confront a concept whose exploration in one sense is highly diverse and open-ended, but in another displays a common limitation. For while the specification of what is ‘new’ in New Governance may be more or less concrete or abstract, it invariably turns on a *categorical* distinction from the ‘old.’ One common starting point at the more concrete or institutional end of the spectrum is to define New Governance in the EU in terms of a departure from the Classic Community Method of norm generation and of governance more generally, centring around the Commission right of initiative and the legislative and budgetary powers of the Council of Ministers and European Parliament.<sup>20</sup> An even more general variant of the institutionally-centred approach finds the defining feature of New Governance simply in its non-legislative or only marginally legislative character, with the very idea of legislation here operating as a proxy for hierarchy.<sup>21</sup> Such a view, indeed, comes very close to defining New Governance as the antithesis of *legal* ordering as commonly conceived, and so, by inference, of *constitutional* ordering as the most fundamental level of legal discourse.

Other more abstract models are less quick to draw substantive inferences from institutional form. They concentrate instead on general properties of new governance, such as participation and power-sharing, multi-level integration, diversity and decentralization, deliberation, flexibility and revisability of norms, and experimentation and knowledge-creation.<sup>22</sup> From this perspective, various particular regulatory forms can be assessed for their New Governance credentials. These include not only the Open Method of Co-ordination – the novel decision-making structure based on iterative benchmarking, voluntary national compliance and mutual learning that is widely perceived to be the most developed and most rapidly spreading form of New Governance – but also older and more familiar devices such as partnership arrangements, comitology and even framework directives. The basic premise however, remains oppositional. The ‘new’ properties explicitly or implicitly acquire definition from their contrast with a model of ‘old’ government based on representation, singular authority, centralized command and control, rigidity and stability of norms, and the uniform application of a received regulatory formula.

Clearly, there are dangers in any binary model of regulatory forms or characteristics. Such a stylized contrast may mask the fact that many ‘actually existing’ old forms of government tended to incorporate some new elements, while the new forms continue to incorporate aspects of the old. In normative terms too, a binary model may encourage us to religiously favour one side in a series of nested oppositions between new and old, progressive

<sup>20</sup> See e.g. J. Scott and D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union” (2002) 8 ELJ 1-18, at 1.

<sup>21</sup> See e.g. A. Heritier, “New Modes of Governance In Europe: Policy-making Without Legislating?” in A. Heritier (ed) *Common Goods: Reinventing European and international Governance* (Boston: Rowman and Littlefield, 2002) 185-206.

<sup>22</sup> See e.g. Scott and Trubek, n20 above, 5-6.

and conservative, and so to discount the resilient worth of some of the old ‘rule of law’ values. Yet defenders of the conceptual currency of New Governance might reasonably respond that their thinking is alert to the dangers of an unduly dichotomous approach, and that it already seeks to counter the inference of mutual exclusivity and to register that the world is invariably a more complex place than any strictly binary model allows. In particular, the development of a “theory of hybrids,”<sup>23</sup> can help us both with the explanatory question of how old and new – hard and soft – combine and interact in practice, and with the normative question of the optimal reconciliation of the virtues associated with each.

Interesting work on hybridity is indeed emerging, and some of it can be found in the present volume.<sup>24</sup> For present purposes, however, we should bear in mind the obvious but not unimportant point that those for whom New Governance constitutes an analytical point of departure continue to display a structural predisposition towards the new. In general terms, this has to do with the basic methodology of theory building. New Governance analysis proceeds by reference to the Weberian notion of an ideal (or pure) type, in which the relations that constitute the ideal types of new (or, indeed, old) governance are the main focus of inquiry and evaluation, and provide the basic default account of the world. Indeed, the very idea of a hybrid or mixed type corroborates this founding assumption, as it suggests the primacy of the different ideal types - or basic species - from which the hybrid is formed.

In more specific terms, bias towards the new is bound up with the awkwardness of developing hybrid forms of normative as opposed to explanatory theory. Many of the more interesting insights of hybrid theorizing, as suggested by De Burca and Scott’s distinction between baseline, developmental and default hybridity,<sup>25</sup> have to do with the causal interface between old and new, where each is conceived in general or holistic terms. Under what circumstances and to what extent, they ask, does the old underpin (baseline) or provide a catalyst (developmental) for the new, or, indeed, its disciplining counterfactual (default)? And while the answers to these questions are not normatively insignificant, in the sense that they show that the basic viability of the new tends to remain dependent upon the old, and also demonstrate how some of the normative dividends of the old and new may broadly co-exist, more detailed assessments of the optimal regulatory mix of old and new conceived of as a set of disaggregated norm-characteristics are harder to come by. This is because, if we dig down to the level of constituent variables, elements of the ‘new’ and the ‘old’ tend to take the form of *logical* opposites (e.g. centralization versus decentralization, singular versus multi-level authority, command versus deliberation, rigid and stable versus flexible and revisable norms), thereby allowing very little analytical leverage for hybrid forms to develop. Just because of the dominance and categorical quality of the initial opposition, hybridity in a normative register, then, would seem to push us either towards a crude and unlikely mix of polarized variables drawn from the opposite camps of new and old (e.g., deliberately produced *but* rigidly and stably articulated and applied norms) or, if we seek to hybridize each individual variable, towards the descriptively bereft balancing point (e.g., relatively (de)centralized, or relatively (in)flexible), or, in some cases, logically incoherent ‘excluded middle’ (e.g., relatively singular?) between these polarized variables.

The instant point is not, however, to question the long-term potential of hybridity as a way of moderating the analysis of New Governance, or perhaps as a promissory note to rethink the whole explanatory and normative paradigm of supranational regulatory

<sup>23</sup> D. Trubek and L. Trubek . “Hard and Soft Law in the Construction of Social Europe: the role of the Open Method of Co-ordination” (2005) 11 ELJ 343-364, at 364.

<sup>24</sup> As previewed by De Burca and Scott, n1 above.

<sup>25</sup> *Ibid*

innovation.<sup>26</sup> Rather, it is simply to confirm that the basic analytical frame through which we construct the idea of New Governance creates a propensity towards oppositional thinking, and since the adoption of that frame tends in any case to be linked with an interest in an openness towards the affirmative possibilities of the new, this may result in the integrity and virtue of the new relative to the old to be exaggerated.

In a nutshell, then, we may observe that the problems associated with constitutionalism at the supranational level seem to find their negative image in the case of New Governance. For if, despite its diversity and internal divisions, constitutional discourse remains constrained by the legacy of an old paradigm, New Governance analysis, by contrast, and again notwithstanding its significant internal differences, risks being in excessive thrall to the new. Let us now seek to examine the implications of this disjuncture between old-fashioned and new-fashioned in terms of the various candidate relationships between constitutionalism and New Governance.

### 3. Some Candidate Relationships

If we recall the four major themes of European constitutionalism, we can now suggest how each of these provides the basis for one possible relationship between constitutionalism and New Governance. In each case, however, as intimated earlier, the connection is in some significant sense limited or compromised.

To begin again from a nominalist perspective, here we can conceive of the relationship between constitutionalism and New Governance in terms of the subsumption of the latter under the former. If constitutionalism is such an open-ended discourse at the supranational level, lacking even the minimal constraints set by institutional and textual path-dependence at the state level and a certain set of social-technological assumptions about what is available as constitutional resources, plausible as constitutional technique and appropriate as constitutional purpose, then what is to stop us just calling New Governance “constitutional”? By a simple strategy of naming – of updating the constitutional catalogue in the light of fresh developments – do we not thereby resolve any tensions between constitutionalism and New Governance?

There are two cumulative objections to such an approach. The first is that if constitutional discourse is so ubiquitous, so stretched by ideological whim and strategy, then its invocation may come to lack any significance other than as a rhetorical device. If constitutionalism is everywhere, then nowhere, the realm of New Governance included, can it claim a special authority, or lend its object some special appropriateness to or core significance within supranational governance relations. Secondly, the dilution of constitutional *discourse* to the point that a claim made in the name of the constitution carries no special authority within or special relevance to governance does not, however, imply that in *practice* there is a constitutional ‘flatland’; for, as we shall see, a higher priority or greater authority may continue to be accorded to certain types of arrangements over others within the positive law and institutional workings of the supranational system. Indeed, the development of a more ‘democratic’ constitutional rhetoric may actually reinforce this to the extent that its permissive message distracts attention from the resilience of underlying authority structures.

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<sup>26</sup> For thoughtful discussion, see Trubek and Trubek, n23 above. For reasons set out in the text above and further developed in section 4(a) below, however, the ‘hybridity’ concept may be more useful in alerting us to some of the outstanding problems with the new governance approach than in resolving these problems.

For its part, the textualist strain within supranational constitutional thinking fits with a instrumentalist conception of the relationship between the constitution and New Governance. Most immediately, the new Constitutional Treaty can be viewed as an instrument through which New Governance in general, and the OMC in particular find articulation in the higher echelons of the EU's regulatory system. The story of OMC's fate in the Constitutional Treaty has been told in detail elsewhere,<sup>27</sup> and here is not the place to repeat it. However, a number of features deserve mention insofar as they demonstrate the strengths and drawbacks of the textualist approach, and indeed point us towards other potential limitations of the constitutional vision.

First, to repeat a point, as with all constitutional texts at their point of emergence, how the Constitutional Treaty addresses the matter of New Governance is in significant part a function of power politics. Yet far more so than at the level of the state, where – for better or for worse – even at transformative constitutional moments the basic structural principle of the polity, namely that of an entity with formally unlimited capacity to act, is regarded as relatively settled, such power politics at the EU level tend to respond to a *double* agenda, one of both “blueprint” and “generative” politics.<sup>28</sup> The treatment of the OMC, accordingly, reflects a complex compromise over two cross-cutting macro-political questions. One involves the traditional right/left question of the emphasis to be placed on ‘Social Europe’ – the focus of key OMCs in economic policy, employment strategy, social inclusion, pensions etc., – as a countervailing force to the single market, and the other involving the underlying structural question of the proper extent of the EU's (as opposed to Member State) competences. As with many multi-level, intersecting compromises, because of the high number of veto strategies in play, its articulation has been largely negative – more about soothing diverse anxieties than pursuing divisive aspirations. On the one hand, therefore, we find that social policy aims central to so many OMCs, and so indirectly the OMC itself, are boosted in the general statement of values and objectives in the opening provisions of the Constitutional Treaty,<sup>29</sup> in the ‘second generation’ Equality and Solidarity Chapters of the Charter on Fundamental Rights<sup>30</sup> and in a new horizontal clause committing the Union to take account of various social policies and objectives in defining and implementing specific policies and actions.<sup>31</sup> Yet, on the other hand, for all that the co-ordination of economic and employment policies is treated as a distinctive mode of competence in the CT,<sup>32</sup> nowhere in the text is the OMC granted explicit constitutional status. This silence, it has been argued, resulted from a deadlock or compromise within the Praesidium of the Convention which produced the draft Constitutional Treaty between those from a state-centred perspective who were concerned at the OMC's potential for ‘soft’ erosion of national policy prerogatives and those of a more *communautaire* disposition who were concerned at its possible undermining of classic “hard” supranational competences.<sup>33</sup> Trapped between these two opposing fears, it ultimately proved impossible for OMC to find its own distinctive constitutional voice.

<sup>27</sup> See e.g. G. de Burca, “The Constitutional Challenge of New Governance in the European Union” (2003) 28 ELR, 814-839, at 830 *et seq.* 2003; J. Zeitlin, “Social Europe and Experimentalist Governance” in G de Burca (ed) *EU Law and the Welfare State: In Search of Solidarity* (Oxford: OUP, 2005) 213-241.

<sup>28</sup> D. Miliband. “Introduction” in D. Miliband (ed) *Reinventing the Left* (Cambridge: Polity, 1994) 1-17 at 5

<sup>29</sup> CT Art. I-3

<sup>30</sup> CT Part II

<sup>31</sup> CT Art. III-117.

<sup>32</sup> CT Art. 1-15.

<sup>33</sup> Zeitlin, n 27 above, at 230.

In the second place, the debate on the place of the OMC in the constitutional text rather underlines the poverty of attempts to think through the idea of postnational constitutionalism in social-technological terms. No constitutional text is self-implementing, least of all one which lacks the epistemic frame of the statist model, yet remarkably little attention seems to have been paid to this fact. Commenting on the possible impact of the relevant sections of the approved constitutional text, and indeed of the alternative option of a generic OMC clause dedicated to asserting high standards of procedural ‘due process’,<sup>34</sup> one observer has remarked that while it appears to be common ground that “constitutional provisions... matter in the EU” in particular through conferring “added legitimacy” there is nevertheless “no clear answer”<sup>35</sup> to *what extent* they matter, or *how* their impact percolates through and resonates within the system. This neatly captures the widespread and complacent assumption within the Constitutional Treaty debate that putting things on a constitutional footing would somehow in and of itself be consequential rather than simply marking another consequence – the point at which political compromise had been reached

Two questions are begged by the assumption of consequentiality. First, and more generally, what basic difference does juridification of New Governance, or indeed any new form of normative ordering make? If and to the extent that the constitutional text were to impose precise or unavoidable new obligations or confer wide-ranging new powers on key organs of government or other agencies, then there might seem to be a relatively simple answer to this at the level of normative authorization. But none of the new provisions, dealing as they do with the designation of vague objectives and general rights and the affirmation of broad jurisdictions, actually possesses that kind of semantic sting. It is difficult to see, in other words, how these provisions could be decisive in persuading or compelling key governance institutions to do what they were not otherwise minded to do, or in empowering anyone do what they were not already capable of doing.

And even if this were not so, a second set of questions of the added value of calling the text constitutional, rather than merely legal, remains unanswered. Inasmuch as the general legal code makes a difference, does the invocation of the special constitutional code make a further difference? Alternatively, even if the conferral of simple legal status makes little or no difference, might the conferral of constitutional status not still do so?

One possible answer suggested by the other two themes of EU constitutionalism – hierarchy and self-containment, is that any difference constitutionalisation makes to the promotion of New Governance is more likely to be negative rather than positive. If we take first the theme of hierarchy, the danger is that this simply fails to correspond to or recognize the operating logic of New Governance. On this view, much of what goes on in the “underworld”<sup>36</sup> of New Governance is hardly touched upon by a constitutional model which is fixated with pedigree norms and the commanding institutional heights of the Community method.<sup>37</sup> At best, then, constitutionalism and New Governance are merely ships in the night, navigating their very different routes with scarcely a passing glance. And indeed, any attempt at greater familiarity, involving the examination of New Governance thorough a

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<sup>34</sup> For its elaboration and discussion, see G. de Burca and J. Zeitlin, “Constitutionalizing the Open Method of Co-ordination: What Should the Convention Propose?” (2003) *CEPS Policy Brief* 31.

<sup>35</sup> Zeitlin, n27 above, at 240.

<sup>36</sup> To adapt Weiler’s description of the profile of the Comitology system in, “Comitology” as Revolution – Infrationalism, Constitutionalism and Democracy’ in C. Joerges and E. Vos (eds) *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999) 339-350.

<sup>37</sup> On the “processualist” critique of documentary constitutionalism more generally, see Walker, “The Legacy of the Constitutional Moment,” (2004) 11 *Constellations* 368-392.

constitutional lens, merely underlines the difficulties involved in trying to reconcile two such diverse operating logics. Thus, to return to the debates on the Constitutional Treaty, one objection to the naming and constitutional anchoring of OMC was that it would, at least implicitly, involve locating OMC in a strict hierarchy of forms of Community governance, either trumping and displacing or being trumped and displaced by certain pre-existing hard competences.<sup>38</sup> Yet the emergence and implementation of many New Governance measures are not well understood in terms of their place in a pecking order of regulatory modalities, but rather as a set of mechanisms that through *content-dependent* persuasion and good practice can variously complement, supplement, challenge, modify, anticipate or consolidate *content-independent* forms of vertically-ordered authority. The danger, then, in trying to reduce OMC mechanisms to a logic which is commensurable with, and so competitive within, a hierarchy of forms, is of forcing square pegs into round constitutional holes.

If we move to the related idea of self-containment, the mismatch between the social technology of traditional constitutionalism and that of New Governance is even more pronounced, and indeed allows us to contemplate the possibility of a structural antagonism between the two. Constitutional self-containment, as noted earlier, has both internal and external dimensions, and each threatens a key dimension of New Governance. Internally, the idea that constitutional authority is exclusive and exhaustive – a preordained unitary order externally imposed upon its objects – does not fit easily with the idea of OMC as a shifting series of experimental and open-ended frameworks of voluntary compliance and emergent self-authorization. This tension we can see, for example, in the reluctance of some to contemplate *any* form of freeze frame constitutionalization of the OMC in the Constitutional Treaty for fear that it might undermine its trademark flexibility and interrupt its dynamic path of development.<sup>39</sup>

Externally, if anything the tension is even more profound. Self-containment, as we have seen, is intimately linked to the idea of the EU as a distinct and separate legal-constitutional order. Yet so much of what is key to the social technology of EU constitutionalism clearly has a relational dimension.<sup>40</sup> In simple terms, the EU shares both territory and people with its Member States, and we cannot conceive of the guiding norms of the EU, the nature of its societal steering mechanisms or the motivations of its citizens in isolation from these state structures. This relational feature is never more pronounced than in the context of New Governance in general and OMC in particular, where it is precisely the failure to agree a definitive and authoritative division of competence and the recognition of the artificiality of such partitions as are in place which has provided much of the impetus for reform, and for thinking about the connection between legal orders in more fluid terms.<sup>41</sup>

#### **4. The Mutual (Re)Engagement of Constitutionalism and New Governance**

##### *(a) New Governance Reconsidered*

It would seem, then, that constitutionalism may offer either too little or too much to New Governance. Too little, if wearing its nominalist clothes, constitutionalism becomes a bland affair – an everyday mantra with no analytical bite; or, if wearing its textualist clothes, it is instead fated to be the casualty of complex multi-level political gridlock. Too much, if the resilient constitutional codes of hierarchy and self-containment – inherited from the state but strongly reasserted in the foundational stages of the EU, colonize and subvert attempts

<sup>38</sup> See Zeitlin, n.27 above, at 230.

<sup>39</sup> *Ibid* 229.

<sup>40</sup> See e.g. N.Walker, 'Postnational Constitutionalism and the Problem of Translation' in J.H.H. Weiler and M. Wind (eds) *European Constitutionalism Beyond the State* (Cambridge: CUP, 2003) 27-54.

<sup>41</sup> See e.g. Scott and Trubek, n20 above; de Burca, n27 above.



made in the name of New Governance to rethink regulation for a post-Westphalian age. Perhaps, then, New Governance has nothing to gain from constitutionalism, other than the instrumental benefits which may accrue to New Governance's supporters through the strategic assertion of a symbolically powerful language in which to couch their claims. Even here, however, any victory threatens to be a Pyrrhic one if the price of adoption of the constitutional register is deference to a social technology which is ultimately at odds with that which animates New Governance.

Before any such dismissive conclusion were drawn, however, New Governance would have to meet its own high standards of justification and demonstrate that it was not in need of any external forms of normative support. Yet in its fixation with 'the new', New Governance, as we have already noted, reveals significant weak points and blind spots. And insofar as these point to important deficiencies and limitations, might not 'old' constitutionalism offer as yet unconsidered means of assisting in overcoming these?

Earlier we identified New Governance's preoccupation with a binary logic as leaving it with little sense of the value, if any, of *anything other than* New Governance. Certainly in its more rigid formulations, the binary mode of identifying New Governance as an important empirical and/or normative force either suggests that 'old' governance' is increasingly insignificant and/or bereft of value, or, even if it stops short of any such categorical dismissal, it nevertheless offers us no clear way of understanding or assessing just how such older forms, with their opposite or countervailing regulatory logic, are supposed to complement New Governance. The turn to hybridity, as we saw, signals some recognition of these problems and some attempt to move beyond them, but the legacy of the original approach is hard to shake off. Either we end up dealing in causal relationships between the old and the new conceived of as very broad generalities, or, if we take a disaggregative approach, we struggle for an effective conceptual language in which to think through the recombination of old and new.

If we try to locate what lies at the root of these difficulties, we may find it in the intensity of focus of the New Governance approach upon matters of institutional design. Such a narrow preoccupation entails that questions such as the deep philosophy of governance and of political organisation which should animate that design or the wider social and political context in which the relevant institutions are embedded, tend to be ignored or relegated to secondary consideration. This is most obvious in the more concrete formulations of the New Governance approach, where we see a kind of institutional fetishism in which different institutional configurations are treated as surrogates for the pursuit of some values rather than others. Yet even in the more abstract formulations of New Governance, we find only a more elaborate route to the same kind of decontextualized institutional conclusion. In emphasizing the context-independent value of matters such as participation, multi-level integration, diversity, deliberation, flexibility and experimental learning, New Governance analysis seems intent on supplying the key ingredients necessary for *any* institutional concoction to pass the 'good governance' test.

Indeed, much of the appeal of the New Governance approach seems to lie precisely in the priority it accords to the 'practical' business of supplying a checklist of widely affirmed regulatory desiderata. This is stressed far more than the inevitably more divisive question of an overall conception of governance which would relate and prioritize these various desiderata both *inter se* and with regard to other governance values, and which would seek to ground the whole in its overall social and political context of emergence and ramification. Yet the very concentration on a broadly palatable institutional recipe which is the source of much of its attraction may also be the most serious shortcoming of New Governance analysis

to the extent that it leads to avoidance or downgrading of these domains of inquiry where New Governance analysis is most vulnerable.

We may demonstrate this, paradoxically, by considering one of the contributions to New Governance analysis which *has* taken these questions of governance philosophy and wider socio-political context seriously, namely the work of the influential democratic experimentalist or pragmatist school.<sup>42</sup> According to the experimentalists, the promise of New Governance in general and OMC in particular lies in their method of addressing the tension between two aspirations of democratic authority. For democratic government is only acceptable if it both produces well-informed decisions that provide practical solutions to collective action problems, and allows participation and voice to those affected by such decisions. Whereas many theories of governance struggle to reconcile these two aspirations, and tend either to subordinate knowledge to voice or voice to knowledge, the experimentalist approach seeks to discover and exploit contexts of action in which the two can be optimally combined. For the experimentalists, a 'bottom-up' perspective, one whose point of departure is self-constituting practical problem-solving units or constituencies (who tend to be groups at the receiving end of classic command and control public sector performance) provides the best way of proceeding. It allows the 'demos' to find its own highly localized level, one where voice is most effective, knowledge and experience most relevant, and motivation most palpable. On this view, the attraction of OMC and the like is that they are sensitive to the primacy of localized understanding and praxis while offering a template in terms of which local solutions can be pooled, exchanged and developed and activity co-ordinated beyond the level of the basic problem-solving unit.

In developing a fully fledged and socially grounded regulatory philosophy along these lines, the experimentalist approach dramatizes two particular types of problem for New Governance. In the first place, there is the problem of the guarantee of the basic regulatory frame or structure of any institutional design, and, in the second place, there is the problem of the specification of the appropriate boundaries of governance.

The problem of the guarantee of the basic regulatory frame has in fact two dimensions, each of which is implicit in all forms of New Governance and becomes explicit in the face of the clear normative priorities of experimentalism. The first addresses the relationship between new and old, and asks, how, in the sacrifice or subservience of 'old' values such as stability and predictability of norms to the demands of experimental learning we can continue to ensure or even presume against the erosion of these norms that we may argue are universal, or at least of resilient relevance across time and space.<sup>43</sup> The second concerns the danger of institutional entropy. How, given the experimentalist and 'bottom-up' basic thrust, can we find an institutional form which has the basic coherence and integrity even to guarantee its own self-reproduction? Is there not a danger either that New Governance in its emphasis upon relentless revisability contains the seeds of its own destruction, or, alternatively, that it opens itself to the charge of performative contradiction by placing certain anchoring premises beyond the possibility of experimental rejection?<sup>44</sup>

<sup>42</sup> See e.g., C. Sabel and M. Dorf, "A Constitution of Democratic Experimentalism." (1998) 98 *Columbia Law Review*. 267; O. Gerstenberg and C.F. Sabel "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?" in C. Joerges and R. Dehousse (eds) *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002); J Cohen and C F Sabel "Sovereignty and Solidarity: EU and US" in J. Zeitlin and D. Trubek (eds.) *Governing Work and Welfare in a New Economy* (Cambridge: Cambridge University Press, 2002) ch.13.

<sup>43</sup> For the posing of these questions in the context of the relationship between OMC and human rights protection, see De Burca, n27 above, 833-5.

<sup>44</sup> One possible answer to the second objection lies in the suggestion that the basic OMC template itself be reviewed and improved by the reflexive application to this higher order level of the key aspects used in the

As regards the specification of the appropriate boundaries of governance and of democratic self-constitution, again the explicitness of the experimentalist approach places the problem of New Governance in sharp relief. Whereas the emphasis upon a certain bundle of regulatory desiderata regardless of context means that it is often left unclear in New Governance analysis at what level of government and to what extent these values should be articulated, experimentalism puts its cards firmly on the table in its identification of the coal-face, problem-solving entity as the primary unit of analysis. Yet considerations of justice, co-ordination and existing political culture mean that this cannot be the only key boundary for the experimentalists. As regards justice, since different problem-solving sectors are not hermetically sealed off from one another, but take decisions that involve significant externalities and indirectly affect a wide range of interests, there has to be a wider context in which these external effects can be addressed and balanced. As regards co-ordination, the very idea of mutual learning and adjustment within and across different OMCs and other experimental regulatory contexts presupposes a delimited zone, whether of functional activity or territory, within which such co-ordination takes place.

Both of these factors suggest the state, and, more importantly for present purposes, the supranational level - given the significant extant ordering and co-ordinating power of each - as other sites and 'outer boundaries' of political organisation beyond the basic problem-solving units. Finally, the special suitability of New Governance in general and OMC in particular to the wider European supranational context is explicitly argued for by advocates of experimentalism on grounds of an existing framework of political understandings and the growing perception within that framework of the need for a revision and a renewal of the Community method.<sup>45</sup> On this view, against a background of growing collective anxiety as to the incapacitating inflexibility of classic Community command-and-control decision-making procedures, the new more permissive regulatory capacities of New Governance are required to enhance deliberative opportunities and secure the levels of collective trust necessary to persuade Member States to relax their *de facto* or *de jure* veto powers sufficiently to save the overall EU system from gridlock. Here, then, the European level is presupposed not just as an objective source of authority, but appealed to as a subjective source of an ongoing commitment – as indispensable as it is elusive – to put things in common.

*(b) Reflexive Constitutionalism*

Taken together, the problem of anchoring the basic regulatory structure and the necessity of providing a framework of political community other and wider than that of the various problem-solving constituencies do indeed provide a significant challenge to New Governance. However, it is a challenge that may be met provided that we look again at the resources of authoritative ordering that may be available through the perspective of constitutionalism.

In one sense, this may seem only *too* obvious a conclusion. As we have already seen, an important part of the constitutional tradition, including the oldest vector of EU constitutionalism, is concerned with the provision of a basic legal framework of political community which both trumps and is generative of other norms. Equally, that part of the

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lower order application of OMC in substantive policy sectors – benchmarking, peer review, monitoring, iterative redesign etc. See Zeitlin n27 above. Yet, however useful an institutional design suggestion, the problem of self-reference remains. However self-critically deployed, the basic OMC methodology remains axiomatic, its original authority unchallenged

<sup>45</sup> See e.g. C. Sabel and J. Zeitlin, "Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe" Unpublished Paper, 2003. See also Zeitlin, n.27 above.

tradition of constitutionalism which focuses not on the universality of norms of good governance but on the particularity of the polity has always been concerned with the bonds of affinity within even very large communities and with how these may be mobilised within a coherent social technology. Yet while these ‘constitutional resources’ seem to address the problems of regulatory anchorage and the construction of a wider framework of political community respectively, they threaten to do so by reasserting just these features of constitutionalism which are in most obvious tension with New Governance. What price the constitutionalization of New Governance if it brings back into the picture the rigid normative and institutional hierarchy and comprehensive self-containment that New Governance seeks to overcome? And what price the constitutionalization of New Governance if it falls victim to a kind of false essentialism – a “personification”<sup>46</sup> of abstract community which masks very particular interests in the name of an illusionary notion of the settled common interest, and which, indeed, provides the dubious ideological ballast to support the hierarchical operating logic and comprehensive pretensions of old-fashioned constitutionalism?

In the most general terms, the prospect of EU constitutionalism offering a solution to the deficiencies of New Governance without undermining its basic purpose depends upon EU constitutionalism nurturing a quality which it actually shares in common with the experimentalist version of New Governance, namely an intense reflexivity. To be ‘reflexive’ means that something is capable of bending or turning back on itself. This amounts to more than a providing a ‘reflection’ – an inert mirror or faithful model of a prior essence. Rather, it is about the possession of the quality of ipseity – of the capacity for *self*-reflection and the possibility of *self*-transformation inherent in that capacity.<sup>47</sup>

How does it help to reconceive of constitutionalism in reflexive terms? It does so by allowing us to think of constitutionalism as the carrier of a generic idea of responsible self-government.<sup>48</sup> The idea of responsible self-government is inherently reflexive in that it involves a self-assertion and a taking of responsibility as two sides of a single coin. By conceiving of itself in constitutional terms the EU is indeed, as many of the sceptics fear, making a claim to autonomy, of being a political community in its own right rather than merely a delegated and subordinate form of political authority, albeit a political community which co-exists with and does not in turn seek to subordinate other and overlapping political communities at state and sub-state level. And in making that claim to autonomy, the EU also must perforce accept full responsibility for its own affairs before both internal and external audiences. Constitutionalism, then, is the language in which both the assertion is made and the responsibility taken

Constitutionalism is thus revealed as the indispensable “discourse of conceptualization and imagination”<sup>49</sup> whereby *any* polity conceives and thus constitutes itself as such. On this view the ‘old’ state tradition of constitutionalism need not be viewed in either of the negative ways portrayed earlier – neither as a paralyzing legacy handed down from a quite different political context nor as a source of indiscriminate borrowing and purely opportunistic rhetoric. Rather, the state is but one species of the genus of responsible self-

<sup>46</sup> Gerstenberg and Sabel, n.42 above.

<sup>47</sup> See e.g. B. Van Roermund, “Sovereignty: Popular and Unpopular” and H. Lindahl, “Sovereignty and Representation in the European Union?”, in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003) 33-54, and 87-114.

<sup>48</sup> Walker n2 above, 343-5.

<sup>49</sup> Weiler, n13 above, at 223.

government, the supranational entity known as the EU another, and the generic idea itself the only basis on which we can meaningfully translate between the two contexts.

But, what, in more detail, should the generic idea of responsible self-government imply at the EU level? It was suggested above that for reflexive constitutionalism to complement and augment new governance in the EU such reflexivity should be intensely pursued. That is to say, it is not enough simply for the EU merely to style itself as a reflexive entity. Indeed, to do things merely *in the name of* responsible self-government can lead to precisely the type of ‘personification’ of a regulatory configuration – its reification as something possessing its own interests – that many proponents of New Governance fear.<sup>50</sup> Rather, intense reflexivity implies close and persistent attention to the conditions in which and purposes for which the very idea of the responsible self-government of a collectivity may be justified.

These conditions and purposes concern the basis on which the collective ‘self’ may be identified and the collective ends it seeks vindicated. Crucially, in this regards, one of the apparent constitutional weaknesses of the EU may turn out be a strength. It will be recalled that a key element in the social technology of state constitutionalism is its epistemic dimension – its understanding of the key generative mechanisms of the political society in question. Typically in the state context this involves some notion of a prior bonding element or source of affinity, and the danger is that the constitution merely ‘reflects’ this rather than undertake a ‘reflexive’ engagement with it. In the context of the EU no such hostages to collective fortune exist. There are no credible candidates to invest collective selfhood with a fixed prior meaning, and thus every opportunity exists for the sense of self-understanding to be constructed or transformed in the process of collective engagement itself. Or to put it another way, while the staple puzzle of state constitutionalism as a form of social technology has been to harness understanding of the epistemic foundations of the political society to the task of ongoing mobilization of collective action, the staple puzzle of EU constitutionalism as a form of social technology is instead to establish a more basic or threshold motivation to put things in common sufficient to construct such a shared epistemic frame. The only justification of the constitutional process, then, – including but by no means limited to the initial formal process of Constitution-making – lies not in the vindication of some existing essence or realisation of inherent potential, but in the productive potential of the process itself in creating and redeeming a sense of collective ‘selfhood’ or political community out of the emergent awareness of common interests it stimulates.

It is quite possible to imagine such a de-reified conception of constitutional order responding to the wider concerns of New Governance. A reflexive constitutionalism should be one with the collective awareness and imaginative resources necessary to secure a conceptual anchor which specifies the default generative structure and normative priorities of the whole without reverting to the statist notion of a rigid and inflexible institutional hierarchy that would confront New Governance with various false choices, (e.g. both normative and institutional hierarchy *or* neither; rigid textual specification *or* constitutional silence, external authorization *or* self-authorization,) or, indeed – to recall another feature of the statist legacy – which is able to conceive of the relational or trans-polity dimension of New Governance networks. Indeed, the major impediments to such a process of constitutional reimagining are practical and ideological rather than cognitive.<sup>51</sup> On the one hand, as we have seen, the practical context of constitution-making invariably pits different

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<sup>50</sup> See Gerstenberg and Sabel, n.42 above

<sup>51</sup> See, for example, the proposal developed and discussed in De Burca and Zeitlin, n.34 above.

blueprint and generative conceptions of politics against one another, and may result in uneasy and epistemically inarticulate compromises. On the other hand, the very idea of a conceptual anchorage, however light, contingent and flexible, retains an idea of content-independent authoritative foundations about which partisans of New Governance remain highly ambivalent.<sup>52</sup>

Yet a reflexive constitutionalism should also be able to overcome these practical obstacles and address these ideological concerns. For it should be capable of persuasively disseminating the idea that what binds the wider political community is no more and no less than the shared pragmatic desire to identify and secure whatever may be in the collective interest, including the conditions under which other and more intimate levels of political community or common action identified by new governance analysis as key political sites can thrive and interact in a just and well-co-ordinated manner. Such a pragmatic sense of constitutionalism both responds to the sceptical fear that constitution-making is simply (supranational) state-building by another name through the modesty and self-discipline of its ambitions, and answers the anti-foundationalist concern of the supporter of New Governance through asserting that the only content-independent ‘foundation’ involved is that minimally required and presupposed in order to justify and enable the search for content-dependent solutions to collective action problems.

Of course, to end on a sober note, whether any such de-reified and thoroughly reflexive conception of constitutionalism is likely to ‘catch on’ at the EU level is quite another question. Many of the sceptics who have opposed the present documentary process with such success have done so precisely because they will not be convinced that the state/supranational relationship need not be negative-sum, and so wish to reject or neuter the idea of a new transnational collective political entity to stand alongside the states. Others have done so because, while perhaps less sceptical in principle, they are unhappy about the embryonic political personality or unsure about the likely mature political personality of the new collective self, and not prepared to take any chances.<sup>53</sup> If we take the idea of a reflexive constitutionalism in the uncharted postnational conditions of European supranationalism seriously, the latter objection should be no more valid than the former, since the personality of the collective should remain within the exclusive gift of the individuals who construct and comprise that collective. It is perhaps the deepest and most disabling paradox of European constitutionalism, however, that this can only ever be demonstrated in the doing, and that the discovery of the collective commitment to become and remain engaged with an ongoing constitutional experiment can never await the proof that such collective commitment is indeed worthwhile.

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<sup>52</sup> See most recently, J. Cohen and C. Sabel, “Extra Rempublicam, Nulla Justita?” *Philosophy and Public Affairs* (forthcoming)

<sup>53</sup> See e.g. N. Walker, “Europe’s Constitutional Engagement” (2005) 18 *Ratio Juris* 385.